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In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, ex rel. MAY JOHNSON,
Petitioner

v.

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of May Johnson

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the district court on reargument (R. 41-45) is reported at 82 F. Supp. 36. The majority (R. 51-58) and dissenting (R. 58-60) opinions in the Court of Appeals are reported at 170 F. 2d 1009.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1948 (R. 61). The petition for a writ of certiorari was filed on January 12, 1949, and was granted on March 7, 1949. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an exclusion proceeding before a board of special inquiry, a medical certificate, concurred in by a medical appeal board, certifying an alien to be a "Mental Defective, Class A," and so excludable, is conclusive on the board of special inquiry as to the medical finding.

2. Whether a medical certificate that an alien is a "Mental Defective, Class A," a classification established by regulation pursuant to statute, is too general a finding to support an exclusion order.

3. Whether the Administrative Procedure Act is applicable to exclusion proceedings in respect of the composition of the board of special inquiry.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 49-61.

STATEMENT

Petitioner, an unmarried woman, thirty-three years of age, a native and citizen of Sweden, ar-

rived at the Port of New York on the S.S. *Stockholm* on March 4, 1948 (R. 11). She applied for admission to the United States as a quota immigrant (R. 12, 20). On March 11, 1948, she was examined by two medical officers, who issued a medical certificate certifying that she had been examined and "found to be afflicted with—MENTAL DEFECTIVE Class 'A' " (R. 13, 22).[1]

The medical officers, in addition to their examination of petitioner, apparently had before them, though the record does not clearly indicate the fact, a statement by the ship's doctor of the *Stockholm*, who treated petitioner during the voyage to New York, and made a report of his observations, bearing the notation, "Special Attention U.S.P.H.S. Ellis Island Hospital" (R. 13, 23-25). In this report, the ship's doctor stated that petitioner, during the voyage, manifested symptoms of "an incipient psychosis" and was placed in the "isolation ward of the ship's hospital" (R. 23). According to the report, petitioner, after first showing symptoms of mere seasickness, thereafter—

> * * * states that she feels herself persecuted—everybody looks at her. She also admits hallucinations. Has difficulty in sleeping. Hears cries, but does not know who is crying. Sees

[1] For the meaning of this certification, see 42 C. F. R. (1947 Supp.) 34.7, Appendix, *infra*, pp. 56-57. See also fn. 7, *infra*, p. 28.

> "faces," don't know who they are, sees them only at night. Feels herself hunted. Tells that she gave wrong information to the Consul when obtaining her visa and thinks herself very sinful. * * * (R. 23).

The report further stated that petitioner revealed that she had been "treated at home for insanity by a doctor for a half year, two years ago" (R. 24). Towards the end of the voyage, the report further stated—

> * * * the patient clears up remarkably. Says she has no recollection of a lot of strange things she had said before. * * * Denies having any hallucinations. Looks considerably better. (R. 24.)

On March 16, 1948, petitioner appeared before a board of special inquiry consisting of Inspectors Clark (chairman) and Danielson, and "Secy. A.P. Fairbanks" (R. 10). She was advised of her right to be represented at the hearing by counsel of her own choice and to have a friend or relative present, and she stated that she desired neither (R. 11). The chairman of the board asked whether she had any comment to make on either the medical certificate or the report of the ship's doctor (R. 13). She made no comment on the medical certificate, but, in respect of the ship's doctor's report, denied having stated that she had ever been treated for insanity and stated that she had no recollection of having told the doctor that she gave

false information to the consul in connection with her application for a visa (R. 13-14). The chairman then advised her (R. 14) that the issuance of the medical certificate certifying her to be a "mental defective"

> * * * renders you mandatorily excludable in so far as this board is concerned, from which exclusion there is no appeal. However, you may appeal from the certificate issued by the Public Health Service to a medical board to be convened by the Public Health Service at which time you may be represented by a physician of your own selection to give testimony in your behalf.

Petitioner stated that she desired so to appeal, and the board of special inquiry thereupon deferred its proceedings pending the appeal to a medical board (R. 14).

A board of three medical officers convened on March 25, 1948, and petitioner was represented before it by Dr. Carlton Simon, a medical witness of her own choosing who testified in her behalf, and a record of the entire proceeding was made (R. 26-32). Dr. Simon testified that in his opinion, reached as a result of an hour's conference with petitioner, she was not "psychotic"; he explained "the episode aboard ship" as being the result of "toxemia," petitioner having drunk "quite heavily" (according to her statement to him) during "several days of partying with

friends" before embarking, and having taken "bromide" and "some sleeping capsule" her first night aboard (R. 27-29). The members of the medical board then questioned petitioner at some length (R. 29-32). She denied having done any drinking before boarding the ship, but stated that she was exhausted from having attended a number of farewell parties (R. 29, 32). She testified that she took "two bromides" and "one sleeping pill" before the ship's doctor saw her (R. 29-30). She admitted telling the ship's doctor about hearing "voices," etc., but denied the truth of the statements made to him (R. 30-31). She was "tired" and "hysteric," she stated, and said "yes" to all the doctor's questions in the hope that she would be left alone to sleep (R. 30-32).

The following day, March 26, 1948, the board of medical officers reported (R. 26) that it had

> * * * considered the appeal [of petitioner] and after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate.

Thereafter, on April 6, 1948, the board of special inquiry reconvened, and the minutes of the previous meeting were incorporated into the record (R. 15). Inspector Danielson, one of the members of the board at the previous hearing, was replaced at the April 6 hearing by Inspector Mintzer, who indicated that he had familiarized

himself with the record in the case (*ibid.*). Petitioner was represented by counsel at the April 6 hearing (*ibid.*). The chairman advised petitioner and her counsel that the report of the medical appeal board, concurring in the original medical certificate, was being made a part of the record, and asked if they had any comment; petitioner's counsel replied, "No comment" (R. 16). Petitioner was then advised that the affirmance of the original medical certificate by the medical appeal board rendered her "mandatorily excludable from the United States from which exclusion there is no appeal"; petitioner replied that she understood (R. 17). Petitioner's counsel, after briefly interrogating petitioner, then made "a statement for the record" that "the report of the Public Health doctor is, apparently, primarily based upon the report of the ship's surgeon"; that Dr. Simon, who appeared before the medical appeal board on behalf of petitioner, was of the opinion that petitioner was "not psychotic and is not suffering from [any] mental disturbance whatsoever"; and that "during the confinement of this alien at Ellis Island she has deported and conducted herself in a normal and sane manner and has given no indication whatsoever of any mental disturbance" (R. 18-19). Counsel also requested leave to adduce further medical testimony of private psychiatrists and to furnish reports of Swedish physicians who may have examined petitioner

prior to her departure for the United States (R. 19). The board of special inquiry, without foreclosing petitioner from presenting such reports (see R. 19), thereupon entered findings to the effect that her application for admission was regular except for the mental defect referred to in the medical certificate of March 11, 1948, concurred in by the medical appeal board on March 26, 1948. It was therefore concluded that she was inadmissible to the United States under Section 3 of the Immigration Act of February 5, 1917 (*infra*, p. 49), and her exclusion was voted by the board (R. 19-21).

On April 21, 1948, one Inga Obum, a friend of petitioner, filed in the District Court for the Southern District of New York, on petitioner's behalf, a petition for a writ of habeas corpus (R. 3-6), which gave rise to the present proceeding. The petition alleged, on information and belief, that petitioner was not mentally defective, that the medical certificate certifying petitioner to be mentally defective was based on a misunderstanding of the report of the ship's doctor and an erroneous impression obtained from interrogating petitioner, and that the medical officers of the Public Health Service ignored the testimony of Dr. Simon to the effect that petitioner was not mentally defective. Miss Obum further alleged that "Since the ship's doctor filed his report, I have personally spoken with him and he has volun-

teered the opinion that [petitioner] is not suffering from any mental disorder" (R. 5).

A writ issued (R. 2), and respondent filed a return (R. 7-9) denying the legal sufficiency of the petition. A copy of the transcript of the proceedings before the board of special inquiry was attached to the return (R. 8, 10-32). On June 10, 1948, the district court (Rifkind, D.J.) entered an order discharging the writ and remanding petitioner to custody, stating that "The only criticism offered is that the Board of Special Inquiry accepted the certificate of the surgeon of the U. S. Public Health Service and rejected that of the alien's own physician. That is not enough to entitle the alien to relief by habeas corpus." (R. 32).

Petitioner's original attorney was thereafter succeeded by another attorney, who, on June 18, 1948, applied to the district court for reargument (R. 34-40) on the following grounds: (1) the board of special inquiry erred in assuming that it had no power to make an independent finding as to petitioner's mental condition (R. 35-37); (2) the medical certificate was not sufficiently explicit as to the nature of petitioner's mental defect (R. 39); (3) the record did not show the qualifications of the examining physicians (R. 39-40); (4) the findings of the original examining physicians, the medical appeal board, and the board of special inquiry were arbitrary, capricious, and unsupported by substantial evidence, in that such findings were

based "solely" on the report of the ship's doctor, who had never been heard under oath or produced for cross-examination, who had been motivated by malice against petitioner in making the report, and had, "prompted I surmise by remorse, subsequently withdrawn his charges" (R. 38-39); (5) the board of special inquiry was improperly constituted under Sections 5(c), 7, and 11 of the Administrative Procedure Act (R. 37-38); and (6) the composition of the board of special inquiry was not the same on April 6, 1948, when it reconvened after adjourning to await the decision of the medical appeal board, as on March 16, 1948, when it originally convened (R. 38).[3]

Reargument was allowed, but the court adhered to its original decision (R. 33, 41-45). The court held that the board of special inquiry acted in accordance with Section 17 of the Immigration Act of 1917 in relying upon the medical certificate (R.

[2] According to the affidavit of petitioner's counsel, filed in support of the motion for reargument, petitioner had informed the affiant that the ship's doctor "behaved * * * in an 'ungentlemanly' way towards her" (R. 39, 35). Apart from this allegation in counsel's affidavit, the only record support for this charge of ungentlemanly misconduct on the part of the ship's doctor is the following cryptic statement by petitioner before the medical appeal board (R. 32): "* * * He [the ship's doctor] is not a gentleman, you know. He put me here and said 'I will give her a chance to go into the U.S. and' he write a report that I was a little mixed up."

[3] A further contention that petitioner did not have the assistance of an interpreter at her examination by the medical officers (R. 40) is no longer pressed. It appears that petitioner speaks English, though not fluently (see R. 29).

42-44); that, since boards of special inquiry are "specially provided for by or designated pursuant to statute" (quoting from Section 7(a) of the Administrative Procedure Act, *infra*, p. 61) they are excepted from the provisions of Section 11 of the latter Act (*infra*, p. 61) pertaining to the use of hearing examiners at hearings provided for by that Act (R. 44); and that the presumption of regularity in the conduct of official business preserved the validity of the medical certificate in the absence of an affirmative showing that the examining doctors were not properly qualified (R. 44-45).

In affirming the order of the district court, the Court of Appeals, one judge dissenting, held that the medical certificate, affirmed by the medical appeal board, was binding on the board of special inquiry under the language and legislative history of Section 17 of the Immigration Act; that the district court correctly held that a board of special inquiry need not be constituted in accordance with the provisions of Section 11 of the Administrative Procedure Act; and that the hearing before the medical appeal board was fair (R. 51-58). The dissenting judge agreed with these propositions of law, but was troubled by "the stark and unadorned form of the medical certificate" (R. 58). He found the certificate "defectively general" and was of the view that there had not been compliance with the requirement of 42 C. F. R. (1947 Supp.) 34.13(h), *infra*, pp. 57-59, that the medical appeal

board's report "shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers" (R. 59).

SUMMARY OF ARGUMENT

I

A medical certificate certifying an alien to be afflicted with a disease or defect which renders him mandatorily excludable under the law is binding and conclusive on the board of special inquiry, under Section 17 of the Immigration Act of 1917. Two decisions under the 1907 Act holding that the certificate should not be given conclusive effect by the board of special inquiry were repudiated by Congress, as shown by the legislative history of the 1917 Act.

II

The issuance of a certificate certifying petitioner to be a "Mental Defective, Class A" was a satisfactory compliance with the regulations, which require no more detailed description in this type of case. Petitioner has made no showing of prejudice from any lack of specificity in the certificate as to the nature of her ailment. She never requested more detailed findings, and there is nothing in the record to suggest that more detailed findings would not have been made if requested. At no stage of the administrative proceedings did she raise any issue as to adequacy of the findings. The

issue was first raised in a motion for reargument of the habeas corpus proceeding, after the writ had been granted and dismissed. It clearly was advanced as an after-thought.

The medical appeal board, too, complied with the regulations. Its findings and conclusions were based on its examination of petitioner and the evidence presented to it, as required by the regulations. The board did "affirm, modify, or reject" the findings of the prior examining medical officers by "concurring" in the original certificate.

III

Petitioner's attacks on the composition of the board of special inquiry, based on various provisions of the Administrative Procedure Act, are unavailing.

The contention that the board members were required by Sections 7(a) and 11 of the Act to be hearing examiners is met by the express provision of Section 7(a) that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." Boards of special inquiry are specifically provided for in Section 17 of the Immigration Act, and so fall squarely within this saving exception. This conclusion is likewise supported by the legislative history of the Administrative Procedure Act.

The contention that the composition of the board of special inquiry violated the separation of functions requirements of Section 5(c) of the Act is answered, not only by the excepting language of Section 7(a), *supra*, but also by the clause of Section 5(c) itself exempting "applications for initial licenses" from the provisions of that subsection, and, further, by the introductory clause of Section 5 exempting "proceedings in which decisions rest solely on inspections, tests, or elections" from the requirements of that entire section. An exclusion proceeding in which, as in this case, the sole ground of exclusion is a medical certificate certifying the alien to be afflicted with an ailment which renders her mandatorily excludable, would seem to fall within both of the categories mentioned.

The fact that one of the board members also recorded its proceedings was not an irregularity under the applicable law and regulations. There is nothing in the record to support the contention that this member was unfamiliar with immigration matters, and, in any event, special competence in that field was not necessary in a case of this type, where the board was bound by the medical certificate showing the alien to be afflicted with an ailment which rendered her mandatorily excludable.

Finally, the fact that one of the immigrant inspectors who sat on the board of special inquiry when it first convened was replaced by another

immigrant inspector when it reconvened was not prejudicial, since the latter inspector had familiarized himself with the brief record and purely formal proceedings to date, and since, in any event, the board had no significant function to perform in view of the binding medical findings.

ARGUMENT

I

The Board of Special Inquiry Properly Considered Itself Bound by the Medical Certificate Certifying That Petitioner Was Mentally Defective.

Petitioner contends that it was error on the part of the board of special inquiry to consider itself bound by the medical certificate of mental defectiveness, as concurred in on appeal by the medical appeal board. It is argued that it was the duty of the board of special inquiry to render a *de novo* decision on the question of petitioner's mental defectiveness, or freedom therefrom, on the basis of all the evidence before it, including the medical certificate and any countervailing evidence petitioner had to offer. (Pet. 8-23.) We submit that the courts below[4] correctly construed the applicable portions of Sections 15 and 17 of the Immigration Act of 1917 (*infra*, pp. 50-51) as requiring the board of special inquiry to accept as binding the medical findings.

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[4] With full concurrence on this point by the dissenting judge (see R. 58, 59).

In 1913, Judge Morton of the District Court for the District of Massachusetts held, in *Ex parte Joyce*, 212 Fed. 282, 284-285 (see also *Ex parte Joyce*, 212 Fed. 285, 287), that it was an error of law, depriving the alien of a fair hearing, for the board of special inquiry to deem itself bound by a medical certificate of feeble-mindedness and to refuse to permit the alien an opportunity to adduce countervailing evidence, which the board of special inquiry would then weigh against the medical certificate. This decision was followed, in 1915, by the Court of Appeals for the First Circuit, in *Billings* v. *Sitner*, 228 Fed. 315, 316-317, the court observing that "Such a construction [making the medical certificate binding on the board of special inquiry] would result in giving the inspecting medical officer, instead of the board, the power of final decision" (228 Fed., at 316).

These two decisions were under Section 10 of the Immigration Act of 1907, 34 Stat. 898, 901, which provided that "the decision of the board of special inquiry, * * * based upon the certificate of the examining medical officer, shall be final * * *." Section 17 of the Immigration Act of 1917 (the law now in effect) changed this language to read, "The decision of a board of special inquiry *shall be* based upon the certificate of the examining medical officer and * * * shall be final * * *" [italics added] (*infra*, p. 51). The legislative history of the 1917 Act provides conclusive proof that the pur-

pose of this change in phraseology was to overcome the effect of the *Joyce* and *Billings* decisions. The Senate committee report on the bill which became the 1917 Act, H. R. 10384, states with respect to Section 17 of the bill (S. Rep. 352, 64th Cong., 1st sess., p. 13):

> * * * Section 10 of the act of 1907, making the certificate of the examining medical officer and the decision of a board of special inquiry based thereon conclusive and final in certain cases of disease and mental defect, has been added to this section as a proviso * * *; but the said provision has been slightly changed so as to clarify its meaning and meet recent court decisions tending to modify the principle, upon which provisions of this kind in the immigration law have heretofore been based, that on medical questions the opinions of doctors as against that of laymen should prevail. Of course practical questions should be determined by the immigration officials, but questions of a purely medical nature must be determined by members of the medical profession.

No clearer indication of a congressional intent to overrule judicial decisions construing an Act of Congress could be found than is contained in the above language. As the court below observed (R. 55):

> It seems clear that the "recent court decisions" referred to in the above Senate Report were those of the federal courts of the First

> Circuit. No others existed which have been called to our attention. The report plainly indicates the Senate Committee's view that these decisions did not properly construe Section 10 of the Act of 1907. In such a setting, the words of Section 17 "that the decision of a Board of Special Inquiry shall be based upon the certificate of the examining medical officer" inevitably indicate that the Board must adopt the findings of the certificate on such medical questions as are here involved. What else can be meant by the words: "on medical questions the opinions of doctors as against that of laymen should prevail." A certificate by the medical board if its action conformed to the statute and regulations and its decision was made after a fair hearing was plainly intended to be conclusive.

Despite the congressional rejection of these two pre-1917 decisions, in 1923 the Massachusetts district court (per Morton, D. J., who had decided the *Joyce* case, *supra*) adhered to the discarded doctrine in *Ex parte Liang Buck Chew*, 296 Fed. 182. But, as observed by the court below (R. 55-56), Judge Morton—

> * * * made no mention of the Senate Report which probably had not been called to his attention and rested his decision that the medical certificate was not final largely upon language in Section 16 of the 1917 Act that the certificate was "for the information * * * of the boards of special inquiry." Undoubtedly,

it was for the information of the latter, who under no circumstances could act without having it before them. That the Board of Special Inquiry was not bound to base its decision, so far as it involved medical facts, upon the certificate does not follow from the terms of the Act of 1917 and seems directly contrary to the Senate Report and its expressed purpose. In this connection, we must remember that the language of the Act of 1917 so heavily relied on by Judge Morton is also to be found in Section 17 of the Act of 1907, so that his reasoning fails to answer the clear implications of the Senate Report.

Petitioner contends, however, that this Court's reversal, on the Government's confession of error, 267 U. S. 571, of *United States ex rel. Fink* v. *Tod*, 1 F. 2d 246 (C. A. 2), indicates concurrence by this Court in the view that a board of special inquiry is not bound by a medical certificate certifying an alien to be afflicted with a disease or mental defect which places him in an excluded class. However, while the opinion of the Second Circuit in the *Fink* case contains language supporting our contention in this respect (see 1 F. 2d, at 253), careful analysis of the opinion shows that the main issue there involved was not so much the conclusiveness of the medical certificate on the board of special inquiry as the finality of the decision of the board of special inquiry. The facts in that case were unique in that after the alien was ordered excluded for fee-

blemindedness on the basis of a medical certificate to that effect which had been affirmed by a medical appeal board, she was accorded five additional medical examinations. The first three of these additional examinations resulted in unanimous findings of feeblemindedness; the fourth, in a unanimous finding against feeblemindedness; and the fifth, in a three-to-two vote in favor of feeblemindedness. The case was further complicated by the fact that certain physicians participated in two or more of the total of seven examinations accorded the alien, and that the vote in each instance seemed to have been influenced if not determined by the make-up of the particular board of doctors. The Second Circuit held that the exclusion proceeding should have been terminated when the board of special inquiry first excluded the alien on the basis of the original medical certificate, this decision being declared "final" by the statute, so that the five subsequent medical examinations should all be disregarded (see 1 F. 2d, at 255-257). In this Court, the Government's brief asked affirmance of the Second Circuit's decision (No. 698, O. T. 1924), but the Solicitor General, at the oral argument, for reasons not disclosed by the record and not found in any of the sources available to us, confessed error. In view of the dissimilarity between the issues involved in the *Fink* case and here, and the uncertainty as to the reasons for the confession of error, this Court's acceptance of the confession of

error and reversal of the Second Circuit decision can, therefore, in nowise be construed as an expression of opinion on the issue now under discussion.

Finally, petitioner's reliance on *Gee Shew Hong* v. *Nagle*, 18 F. 2d 248 (C. A. 9), is misplaced. In that case the alien seeking admission was originally found to be free of physical and mental defects. That fact was certified by the medical examiners to the board of special inquiry. Thereafter, for some reason not disclosed by the record, the case was referred back to the medical officers for a further physical examination. The alien was then found to be afflicted with a loathsome or dangerous contagious disease. Upon that second certification he was denied admission by the board of special inquiry. The alien challenged his exclusion on the ground that the first certificate was final and conclusive and that the second examination and certificate were unauthorized. In rejecting that contention, the court did use some language supporting petitioner's argument here, but the language was *dictum*. That was not a case in which the board of special inquiry exercised an independent lay judgment on medical matters, overruling the medical opinion expressed in the medical certificate. Rather, it was a case which was reopened upon the initiative of officials of the Immigration and Naturalization Service, asking a reexamination, but who made no attempt to supersede the medical decision with a lay opinion. This same

procedure is open to the Service at the present time under the Immigration and Naturalization Service regulations (8 C. F. R. (1947 Supp.) 90.10, 90.11, 136.5 and 136.6),[5] which provide specifically for the reopening of a hearing in specified circumstances, either before or after the issuance of a final order.[5a] We do not conceive that a reversal by the medical officers themselves of their original decision indicates in any way that lay opinion can or should be allowed to supersede medical judgment on purely medical matters.[5b]

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[5] See also 42 C. F. R. (1947 Supp.) 34.13(a)(1) and 34.13(i).

[5a] The impracticability of permitting the review of medical questions by lay members of boards of special inquiry is apparent when the following figures are observed. During the fiscal year ending June 30, 1948, 81,323,823 aliens and citizens arrived and were examined at United States ports of entry. Of these 40,305,105 were aliens. The remaining 41,018,718 were citizens. In conducting exclusion proceedings affecting the alien group it was necessary to hold 18,968 board of special inquiry hearings. It is essential that procedures be relied upon which do not cause delay in the handling of such vast numbers of persons. (These figures have been collected for the forthcoming annual report of the Attorney General. For comparable figures for the fiscal year ended June 30, 1947, see the Annual Report of the Attorney General for the fiscal year ended June 30, 1947, p. 619, typewritten copy retained in the Justice library.)

[5b] It is to be noted that 8 C. F. R. (1947 Supp.) 136.1, *infra*, p. 55, provides that "When an alien is certified for a physical defect other than tuberculosis in any form or a loathsome contagious or dangerous contagious disease, the board of special inquiry must decide *on the basis of all the evidence (including the medical certificate)* whether or not such certified defect may affect his ability to earn a living." (italics added).

II

In the Absence of Any Showing of Prejudice or Refusal of the Examining Physicians to Make, on Request, Detailed Findings Respecting Petitioner's Mental Condition, the Medical Certificate Certifying Her to be a "Mental Defective, Class 'A'" Was Not too General to Support the Exclusion Order.

Petitioner urges (Pet. 24-27) that it "was error on the part of the board of special inquiry and of the courts below to use as basis for petitioner's exclusion a medical report so vague, indefinite, and perfunctory, that it did not show the nature of petitioner's purported affliction nor the qualifications

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The regulations thus recognize the power and duty of the board of special inquiry to make an independent determination, on the basis of all the available evidence, of whether or not a physical defect (other than tuberculosis or a loathsome or dangerous contagious disease) may affect the alien's ability to earn a living, the medical certificate being merely evidential on this particular issue. In such cases, Section 3 of the Immigration Act (*infra*, p. 4) makes the alien excludable only if the physical defect is of such a nature as to affect his ability to earn a living. On the other hand, the regulations clearly contemplate that a medical certificate certifying the alien to be afflicted with tuberculosis, a loathsome or dangerous contagious disease, idiocy, imbecility, epilepsy, insanity, feeblemindness, constitutional psychopathic inferiority, mental defectiveness, or chronic alcoholism is to be given conclusive effect by the board of special inquiry since these diseases or defects make the alien automatically excludable. See 8 C. F. R. (1947 Supp.) 136.1 and 136.2, *infra*, p. 55. The regulations are thus in full accord with the interpretation of Section 17 of the Immigration Act made by both courts below, and with the Act's legislative history (*supra*, p. 17), i. e., that medical judgment is to prevail on medical matters and "practical questions" are to be "determined by the immigration officials".

of the examining physicians, that it was based exclusively upon the insufficient evidence of the hearsay report of the Swedish ship's doctor" (Pet. 24).

The last two aspects of this contention do not, we think, require extended discussion.

(a) In respect of the absence of a statement on the face of the medical certificate showing the qualifications of the examining medical officers, we find no evidence presented by petitioner that they were not qualified in accordance with Section 16 of the statute (*infra*, pp. 50-51),[9] and there is no requirement in the statute or the regulations governing the examination that such information be included in the certificate. Petitioner, though represented by counsel at the hearing before the board of special inquiry after her appeal to the medical appeal board (see pp. 6-8, *supra*), did not raise any such issue. In view of the total lack of record support for the suggestion that the examining

[9] Petitioner states that she "expressly alleged on information and belief that the medical examiners were not qualified under the said statute" (Pet. 26). The reference is to an averment, by petitioner's second attorney in support of the motion for reargument of the habeas corpus proceeding in the district court, that "In view of the absence of such showing of the qualifications [on the face of the medical certificate] and because I have been informed that some of the examining physicians were quite young, it is urged, on information and belief, that the medical examiners were not qualified to act under Section 152, Title 8, U. S. C." (R. 40). We fail, however, to see how the youth of the physicians (assuming the fact) could be relevant, and all that remains of the allegation is the bald legal conclusion of lack of qualification.

medical officers were unqualified, we submit that the district court was clearly correct in observing that "The presumption of regularity in the conduct of official business * * * is sufficient to preserve the validity of the certificate, at least, in the absence of an affirmative showing of non-compliance with the statute" (R. 44-45).

(b) As to the allegation that the medical certificate "was based exclusively upon * * * the hearsay report of the Swedish ship's doctor" (Pet. 24), the record simply contradicts the assertion. The certificate states that "the above-described person *has this day been examined* and is found to be afflicted * * *" [italics added] (R. 22). Indeed, as we have pointed out (*supra*, p. 3), while we may assume that the examining physicians had access to the report of the ship's doctor, the record does not clearly indicate even that much. It is true that the medical appeal board had the ship's doctor's report before it (R. 29), but the board certainly did not base its decision affirming the medical certificate on that alone. The record shows that the physicians on the medical appeal board heard the testimony of petitioner's medical witness, Dr. Simon (R. 27-29), extensively interrogated petitioner (R. 29-32), and then issued their report stating that they concurred in the certificate "after taking into consideration the certificate * * * and the testimony given by Dr. Carlton Simon" (R. 26). How much weight the medical

officers may have given to the report of the ship's doctor it is impossible to say, but the court below was clearly correct, we submit, in holding that it was for the medical officers to determine what weight should be attached to it (R. 57-58). It is to be noted in this connection, as the court below observed (R. 58), that "the report of the Swedish doctor had confirmation in the alien's own admission [to the medical appeal board] that she told him that she had hallucinations," though she at that time denied the truth of what she had admitted (see p. 6, *supra*).

(c) Petitioner's criticism that the medical report did not show the specific nature of her affliction we believe to be equally groundless. This matter was not discussed in the majority opinion below, though the contention must have been considered and rejected, since the dissent is based solely upon "the stark and unadorned form of [the] medical certificate" (R. 58) and the supposed failure of the medical appeal board to follow the applicable regulations (R. 59), which latter ground we shall consider under (d), *infra*, pp. 32-34.

In the first place, there is no indication whatever that petitioner was prejudiced by any lack of information as to the nature of the mental defect found by the medical officers or that she failed to understand what the defect was. If she felt that the lack of specificity in the certificate as to the

nature of her ailment might prejudice her attempt to have it reversed or modified on her appeal to the medical appeal board, she certainly could have requested the medical officers to be more specific in their findings. There is nothing in the record which indicates that any such request was ever made or refused. Neither did she complain to the medical appeal board about the lack of specificity in the certificate. Nor did her medical witness before the medical appeal board, Dr. Simon, make any such complaint. Further, though she was represented by counsel in her second appearance before the board of special inquiry, after the medical appeal board had filed its report, she still did not object to the form of the medical certificate. Her counsel asked leave to present additional countervailing evidence, but made no attack on the form of the certificate or of the medical appeal board's report concurring therein. Indeed, the form of the certificate was not criticized even in the petition for habeas corpus. The point was first made in the affidavit of petitioner's new counsel in support of her application for reargument in the habeas corpus proceeding (see p. 9, *supra*). It plainly is an after-thought. Even now petitioner does not claim prejudice, but bases her complaint upon mere formal insufficiency by way of technical non-compliance with the regulations.

We submit, however, that the regulations were fully and literally complied with. The regulations

governing the medical examination of aliens are found in 42 C. F. R. (1947 Supp.), Part 34 (copied in pertinent part in the Appendix, *infra*, at pp. 55-59). Section 34.2(c), *infra*, p. 56, defines the medical certificate as—

> A document issued by an examining medical officer to the Immigration Service, signed by him and certifying his findings with respect to an alien's physical and mental condition.

And in Section 34.7, *infra*, pp. 56-57, provision is made for the issuance of a Class A certificate[7] in respect of any alien who is found to be afflicted with any of the following physical and mental diseases and defects:

> (a) Tuberculosis in any form;
>
> (b) A loathsome or dangerous contagious disease;
>
> (c) Idiocy, imbecility, feeblemindedness, epilepsy, insanity, chronic alcoholism, or constitutional psychopathic inferiority;
>
> (d) A mental defect not enumerated in paragraph (c) of this section; *Provided, however,* That a Class A certificate * * * shall in no case be issued with respect to an alien hav-

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[7] A Class A certificate is issued with respect to diseases or defects which make an alien automatically excludable under the statute (*infra*, pp. 49, 56-57), a Class B certificate with respect to physical defects which make the alien excludable if they are of such a nature that they may affect his ability to earn a living (*infra*, pp. 29-31, 49, 56-57), and a Class C certificate with respect to other diseases or defects not covered by Class A or B (*infra*, p. 57).

> ing only mental shortcomings due to ignorance, or suffering only from a mental condition attributable to remediable physical causes, or from a psychosis of a temporary nature caused by a toxin, drug, or disease.

The medical certificate issued in this case, reporting that petitioner had been examined and found to be a mental defective, and was therefore in Class A, constituted a satisfactory compliance with these provisions. That it was unnecessary under the regulations, at least in the absence of any request to that effect by the alien, for the medical officers to state more explicitly the nature of the mental deficiency found to exist, is emphasized by contrasting with the provisions of Section 34.7, *supra*, those of Section 34.8. The latter section (*infra*, p. 57), establishing the Class B certificate, provides:

> A class B certificate * * * shall be issued with respect to an alien who has a physical defect which is of such a nature that it may affect his ability to earn a living. The certificate * * * shall state the nature and extent of the physical defect, whether it is chronic or permanent, and the extent to which it is likely to render the alien incapable of pursuing a vocation or profession for which he has particular training or experience, or, if he has no such vocation or profession, incapable of performing ordinary physical or manual work.

There is good and sufficient reason for the specificity required with respect to a Class B certificate which further emphasizes the function concerning "practical questions" exercised by boards of special inquiry. (See footnote 5b, *supra.*) The holder of a Class B certificate has a chance to be admitted to the United States, provided it can be shown that the disability, which is the basis of the certificate, will not interfere with ability to earn a living, and provided a bond can be furnished in accordance with the terms of section 21 of the Immigration Act of 1917 (*infra,* p. 52). It follows, therefore, that information relative to the "nature and extent" of the physical defect is necessary for the deliberations of the boards of special inquiry. No such specificity is demanded where the disability found to exist is one of those for which a Class A certificate is issued, inasmuch as a Class A determination calls for mandatory exclusion.

The differentiation between Class A and Class B certificates in respect of the requirement of specificity in the findings is further emphasized by the provision of 8 C. F. R. (1947 Supp.) 130.4, *infra,* p. 54, that—

> Where the certificate of the medical examiner fails to describe particularly the nature, character, and extent of the physical defect which it is certified may affect the ability of the alien to earn a living [i.e., a Class B defect], boards of special inquiry shall call such

> examiner as a witness and interrogate him fully as to the particular nature, character, and extent of the affliction certified. Such testimony shall be made a part of the record.

Significantly, the regulations neither require nor authorize the board of special inquiry to call the medical examiner or examiners for the purpose of ascertaining in more detail the nature of the disease or defect for which a Class A certificate has been issued. The reason for this would seem to be apparent. Where a Class A certificate has been issued, it is binding on the board of special inquiry. See Point I, *supra* pp. 15-23. The board must, in that event, find the alien mandatorily excludable, so that further inquiry into the nature of the disease or defect becomes unnecessary.

Moreover, the terms "mental defect" and "mental defective", far from being "so vague, indefinite, and perfunctory" that they cannot "show the nature of petitioner's purported affliction" (Pet. 24), have an accepted meaning and connotation for the medical profession. See 10 Enc. of Soc. Sciences, p. 312, article on "Mental defectives" by Dr. David M. Levy; cf. Webster's New International Dictionary (2nd ed.), pp. 686 ("defective") and 1536 ("mental deficiency"). And, at the same time, it must be recognized that the present state of psychiatry is such that there is little common acceptance of very precise or specific terms of diagnosis—comparable to the ter-

minology generally employed to denote physical diseases and ailments.[8]

(d) The dissenting judge, in addition to criticizing the original medical certificate as being "defectively general," also was of the view that the medical appeal board failed to follow the applicable regulations governing appeals to it from the initial certification (R. 59), and his views in this respect are now adopted by petitioner (Pet. 24). The regulations governing such appeals are contained in 42 C. F. R. (1947 Supp.) 34.13, *infra*, pp. 57-59. The dissenting judge thought, erroneously, we believe, that the report made by the medical appeal board did not comply with subsections (g) and (h) of Section 34.13, which provide:

> (g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.
>
> (h) The board shall report its findings and conclusions to the Immigration Service, and shall also give prompt notice thereof to the

[8] These regulations authorizing the issuance of the various types of certificates are in full accord with the statute, which specifically grants power to issue administrative and medical regulations governing the medical examination of incoming aliens (Immigration Act, secs. 11, 16, *infra*, pp. 49-50). Nothing in the pertinent sections of the Immigration Act (secs. 3, 11, 16, 17) requires or even suggests that a medical certificate of the type involved here should be more specific than petitioner's.

alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers.

In the reexamination of petitioner by the medical appeal board (R. 26-32), she was represented by a medical witness of her choosing, and both the witness and petitioner were carefully examined by the members of the board. The entire proceeding was included verbatim in the report of the board, as required by subsection (g), and the findings and conclusions were specifically stated to have been based upon the previous certificate, the appeal proceedings, and the testimony of petitioner's witness.[9] As required by subsection (h), the findings and conclusions were reported to the Immigration Service, and petitioner was likewise informed of the result at the hearing before the board of special inquiry, if not before. The board's report did "specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers" (subsection (h)), as follows (R. 26):

[9] Petitioner does not question the existence of evidence supporting the certificate and the medical appeal board's finding of concurrence, and she could not well do so (R. 13, 23-32). If such an attack were made by an alien in habeas corpus proceedings, the board's findings and conclusions, as required by the regulations, would be entirely sufficient as a basis for judicial scrutiny, since they incorporate a verbatim report of the board's proceedings.

> Pursuant to the request of the District Director of Immigration and the order of the Medical Officer in Charge, the following Board of Medical Officers of the U. S. Public Health Service, has considered the appeal regarding subject—named May Gunborg Johnson and after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate.

Since, as we have already shown (*supra*, pp. 26-32), the medical certificate need "find" nothing more than the fact that an alien is afflicted with a mental defect, we submit that the above statement of concurrence, based upon a verbatim reported account of unobjectionable proceedings, constituted full compliance with the regulations and was sufficient for all purposes.

III

The Board of Special Inquiry Was Properly Constituted

Petitioner contends (Pet. 28-36) that the board of special inquiry was improperly constituted in the following respects: (a) the members of the board were not examiners appointed pursuant to Section 11 of the Administrative Procedure Act of 1946, *infra*, p. 61;[10] (b) the composition of the

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[10] In our brief in opposition to certiorari, p. 23, we called the Court's attention to the fact that petitioner, in her brief in the Court of Appeals, conceded that boards of special inquiry are exempt from the requirements of Section 11. We have since learned that petitioner withdrew this concession at the oral argument below.

board violated the separation of functions requirements of Section 5(c) of the Act, *infra*, p. 60; (c) one of the members of the board was also the secretary who recorded its proceedings; and (d) one of the immigrant inspectors who sat as a member of the board on March 16, 1948, was replaced by another inspector when the hearing resumed on April 6, 1948. We submit that the board was properly constituted, but that in any event, if we are correct in our contention (Point I, *supra*, pp. 15-23) that the board was bound by the medical certificate certifying petitioner to be a mental defective and hence mandatorily excludable, she could have suffered no prejudice from any defect in the make-up of the board.

(a) It is the Government's contention that proceedings before boards of special inquiry are not governed by the Administrative Procedure Act. Section 7(a) of that Act, *infra*, pp. 60-61, prescribing who shall preside over hearings governed by the Act, provides as follows:

> PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; *but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute.* (Italics supplied)

Boards of special inquiry, we submit, fall squarely within the saving exception for "boards * * * specially provided for by or designated pursuant to statute." This is so because Section 17 of the Immigration Act, *infra*, p. 51, establishing boards of special inquiry, expressly and precisely provides that—

> Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. * * *

Here we have not merely an authorization to appoint to boards of special inquiry such immigration officials as may be designated by the Commissioner, but a statutory command that the boards be so constituted.[11] Clearly, therefore, boards of

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[11] See 8 C. F. R. (1947 Supp.) 60.29 and 130.1, *infra*, pp. 52-54, for the administrative regulations, issued pursuant to Section 17 of the Immigration Act, relating to the appointment and qualifications of members of boards of special inquiry.

special inquiry are "boards * * * specially provided for by or designated pursuant to statute," within the meaning of Section 7(a) of the Administrative Procedure Act, and consequently need not be composed of examiners appointed in accordance with Section 11.[12]

This construction of Section 7(a) accords with the general policy of the Act, the object of which was to regulate procedures developed by the administrative agencies in the exercise of their discretionary authority. Its sponsors affirmatively disclaimed any intention to disturb procedures theretofore specifically prescribed by Congress itself. Senator McCarran, Chairman of the Senate Judiciary Committee in charge of the bill (S. 7) ultimately enacted as the Administrative Procedure Act, so stated on the floor of the Senate in the following colloquy concerning the application of the Act to procedures before the Interstate Commerce Commission (92 Cong. Rec. 2152; Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 307):

> MR. REED. I confess a lack of understanding of the bill. I have had considerable experience with some of the Government agencies, particularly the Interstate Commerce Commission. Over the years the Congress has

[12] This has been the consistent view of the Immigration and Naturalization Service. See statement of former Commissioner Carusi in *The Federal Administrative Procedure Act and the Administrative Agencies* (1947), p. 292. See also Note (1949) 49 Col. L. R. 73, 78-80.

laid down rules of procedure instructing the Interstate Commerce Commission as to how to act in certain cases in the matter of rate making, valuations, and orders. All that is prescribed by statute. Is there anything in this bill that would interfere with that procedure?

MR. MCCARRAN. There is nothing in this bill which would interfere with such procedure.

* * *

MR. REED. And it would not change its method and the rule of doing business when the method and rule is founded on statutory authority?

MR. MCCARRAN. That is correct.

MR. REED. I thank the Senator.

MR. MCCARRAN. Let me say to the Senator from Kansas that that has been one of the great problems we have had to work out in the long months of study which we have devoted to the bill. We did not wish to disrupt or change anything that was statutory; and yet we wanted to establish something which would prescribe and define the avenue by which the individual citizen could gain access to a public agency which would touch his private life, and we wished to find for him a way through the procedure.

Senator McCarran, in commenting on the intended effect of the provisions for judicial review of administrative orders (Section 10, 5 U. S. C. 1009), again emphasized that the bill was in nowise

intended to repeal any Act of Congress. He stated (92 Cong. Rec. 2154; Sen. Doc. No. 248, p. 311):

> MR. MCCARRAN: * * * But in answer to the first part of the Senator's question—namely, where a review is precluded by law—we do not interfere with the statute, anywhere in this bill. Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress.

The legislative history of the Administrative Procedure Act thus makes it clear that the purpose of Sections 7(a) and 11 was to establish a system of hearing examiners for the conduct of agency hearings required by statute (Section 5, *infra*, pp. 59-60); where the statute itself is silent in respect of what officers shall conduct the hearings or how they shall be selected.[13] Any other construction of Section 7(a) would render meaningless the excepting language, "* * * but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part

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[13] For examples of such statutes, see 7 U. S. C. 193; 15 U. S. C. 45; 21 U. S. C. 344(b), 355(d) and (e); 39 U. S. C. 232.

by or before boards or other officers specially provided for by or designated pursuant to statute."[14]

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[14] *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C. A. 3), vacated on other grounds, 168 F. 2d 1014, cited by petitioner (Pet. 28), relates to the question of the applicability of the judicial review provisions of the Administrative Procedure Act (Section 10, 5 U. S. C. 1009) to deportation orders, the issue being whether, in view of 8 U. S. C. 155(a) (declaring the Attorney General's decision to deport an alien "final"), deportation orders are subject to Section 10, the opening clause of which excepts from the judicial review provisions thereof any agency action in respect of which judicial review is precluded by statute. The *Trinler* case held that, notwithstanding 8 U. S. C. 155(a), deportation orders are subject to the judicial review provisions of Section 10. *United States ex rel. Lindenau* v. *Watkins*, 73 F. Supp. 216 (S. D. N. Y.), reversed on other grounds *sub nom. United States ex rel. Paetau* v. *Watkins*, 164 F. 2d 457 (C. A. 2), also cited by petitioner (Pet. 28), seems to have assumed, without discussion, the applicability of Section 10 to deportation orders. These cases have no relevance here, however, since the instant case involves no question as to the applicability of Section 10 to an exclusion order.

Eisler v. *Clark*, 77 F. Supp. 610 (see also Appendix II, Pet. 55-58), decided by Judge Goldsborough of the District Court for the District of Columbia, appeal dismissed on October 4, 1948, by stipulation of parties, held that deportation proceedings are required by the Administrative Procedure Act to be conducted by hearing examiners. This decision has, however, in effect been overruled by *Wong Yang Sung* v. *Clark* (C. A. D. C.), decided April 4, 1949, which affirmed Judge Holtzoff's contrary decision in *Wong Yang Sung* v. *Clark*, 80 F. Supp. 235. In accord with the *Wong Yang Sung* decision is *Azzollini* v. *Watkins* (C. A. 2), decided March 10, 1949; see also, *Ex parte Wong So Wan*, 82 F. Supp. 60 (N. D. Cal.). It is not necessary for the purposes of this case, however, to determine whether the *Wong Yang Sung*, *Azzollini* and *Wong So Wan* cases were correctly decided. Those cases have no necessary bearing because the question as to the applicability of the

(b) Petitioner's further contention—that the composition of the board of special inquiry violated the separation of functions requirements of Section 5(c) of the Administrative Procedure Act, *infra*, p. 60, in that the members of the board were "responsible to and subject to the supervision and direction of their superiors in the Service, their officers, employees and agents who are engaged in the performance of the investigating and prosecuting functions of the Service" (Pet. 36)—is answered, we think, by the same considerations we have mentioned under (a), *supra*, pp. 35-40. For, since "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or des-

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examiner provisions of the Administrative Procedure Act to *deportation* proceedings raises a different problem from that of their applicability to *exclusion* proceedings. *Exclusion* proceedings are had before boards of special inquiry, which, as we have stated (*supra* pp. 35-37), are specifically provided for by Section 17 of the Immigration Act, and for that reason fall squarely within the language of Section 7(a) of the Administrative Procedure Act excepting "boards * * * specially provided for by or designated pursuant to statute" from the examiner provisions. With respect to *deportation* proceedings the issues are different, for reliance is had on Section 16 of the Immigration Act, 8 U. S. C. 152, which does not refer to boards of special inquiry and pertains to "immigrant inspectors" in somewhat more general terms than Section 17 uses for boards of special inquiry. See *Wong Yang Sung* v. *Clark*, *supra* and *Azzollini* v. *Watkins*, *supra*. Furthermore, Congress has not provided for the granting of hearings in deportation cases, such hearings being accorded as a matter of constitutional due process.

ignated pursuant to statute" (Section 7(a)), it follows that the separation of functions provisions of Section 5(c) are no more applicable to proceedings before boards of special inquiry than are the examiner provisions of Sections 7(a) and 11.

There is, however, an additional reason why Section 5(c) has no application to exclusion proceedings generally, *viz.*, the provision in the last sentence of Section 5(c) that that subsection "shall not apply in determining applications for initial licenses." The term "license" is defined in Section 2(e), *infra*, p. 59, as including "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." Seeking to enter the United States would seem to involve an application for a "license" within the broad and functional definition of Section 2(e). The phrase "determining applications for initial licenses" in Section 5(c) refers to the grant or denial of an application for a license, as opposed to such matters as the revocation or suspension of licenses.[15] Accordingly, it is believed that the pro-

[15] The rationale of this exception for proceedings involving "determining applications for initial licenses" is discussed in the *Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 50-53. It is there pointed out that "The Administrative Procedure Act is based upon a broad and logical dichotomy between rule making and adjudication, i.e., between the legislative and judicial functions. * * * The legislative history of section 5(c) reveals that 'determining applications for initial licenses' was exempted from the requirements of the subsection on the ground that such proceedings are similar to rule making" (p. 50).

ceedings of boards of special inquiry in determining whether aliens are entitled to be admitted into the United States involve the determination of "applications for initial licenses," and are therefore not subject to the requirements of Section 5(c).[16]

The foregoing two arguments against the applicability of the separation of functions provisions of Section 5(c) to proceedings before boards of special inquiry apply generally to all proceedings before such boards. There is, however, a third reason why Section 5(c) should not be deemed to apply to the proceedings before the board in the particular type of case here involved. The introductory clause of Section 5 excepts, not merely from the provisions of subsection (c), but from Section 5 in its entirety, "(3) proceedings in which decisions rest solely on inspections, tests, or elections" (*infra*, pp. 59-60).[17] Where, as in this case, the sole basis for exclusion is medical, the determination of the alien's mental condition is made

[16] This is the contemporaneous and consistent interpretation of Section 5(c) by the Immigration and Naturalization Service. See statement of former Commissioner Carusi in *The Federal Administrative Procedure Act and The Administrative Agencies* (1947), p. 292.

[17] For the genesis and rationale of this exception, see the *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 37; for the legislative history and for other examples, see *The Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 44-45.

by the Public Health doctors (with a right of appeal to a medical appeal board in the event the determination is adverse to the alien). Since, as we have argued (point I, *supra*, pp. 15-23), the finding of the medical officers (or the medical appeal board where there has been an appeal) is binding and conclusive on the board of special inquiry, it is evident that the hearing before the board of special inquiry is in reality a mere formality where, as here, there are no non-medical grounds for exclusion. Thus, where, as in this case, an alien is excluded solely upon medical grounds, the decision must be deemed to rest solely on an "inspection" or "test" within the meaning of the introductory clause of Section 5, with the result that the proceedings in such exclusion cases are exempt from the provisions of that section in its entirety.[18]

(c) Petitioner's objection to the fact that Mr. Fairbanks (who acted as secretary to the board of special inquiry to record its proceedings) sat as a member of the board, is without merit. Section 17 of the Immigration Act, *infra*, p. 51, provides that "Each board [of special inquiry] shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization,

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[18] This is also a separate and independent ground for rejecting petitioner's other contentions under Section 7, since that provision of the Administrative Procedure Act is applicable only to proceedings governed by Section 5 (*infra* p. 60). See also fn. 19, *infra* pp. 46-47.

with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards." And 8 C. F. R. (1947 Supp.) 130.1, *infra*, pp. 53-54, provides that "One of the members [of the board of special inquiry] may act as secretary for the purpose of keeping the complete permanent record of the proceedings before the board and of all such testimony as may be produced before it." The appointment of Mr. Fairbanks to the board and his designation as secretary to record its proceedings were therefore entirely regular. *United States ex rel. Minuto* v. *Reimer*, 83 F. 2d 166, 168 (C. A. 2).

Petitioner's contention that Mr. Fairbanks did not possess such competence as a board member as to bring him within the spirit of the exception of Section 7(*a*) for special statutory hearing officers is likewise without merit. The contention is based on the assumption that Mr. Fairbanks was a mere "stenographer, temporarily employed and uninstructed in immigration matters" (Pet. 33), an assumption that finds no support in the record. For aught that appears, Mr. Fairbanks may have had extensive experience as a member of boards of special inquiry and consequently may have been just as qualified to act in that capacity as an immigrant inspector. Obviously, the fact that he was a competent stenographer and reporter does

not necessarily indicate that he was "uninstructed in immigration matters."[19]

(d) Petitioner's final contention is that the proceedings before the board of special inquiry contravened that clause of Section 5(c), *infra*, p. 60, providing that "The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency." The argument is based on the fact that Inspector Danielson, who was one of the three members of the board of special inquiry when it first convened on March 16, 1948, was replaced by Inspector Mintzer when the board reconvened on April 6, 1948 (*supra*, pp. 4, 6-7). However, the non-applicability of any of the provisions of Section 5(c) to this

[19] In any event, if we are correct in our view (point I, *supra*, pp. 15-23) that the finding of the medical officers was binding upon the board of special inquiry, then the latter, in this case, had no function to perform that would require special competence in immigration matters. The sole ground for petitioner's exclusion having been medical, petitioner could in no way have been prejudiced by the composition of the board of special inquiry.

Furthermore, as we argued at pp. 43-44, *supra*, where the exclusion of an alien is based solely upon medical grounds, the decision rests solely on "inspections" or "tests" within the meaning of the introductory clause of Section 5, excepting from all of the provisions of Sections 5, 7, and 8, "proceedings in which decisions rest solely on inspections, tests, or elections." In such a case, therefore, the composition of the board of special inquiry is in no way governed by Section 7.

proceeding has previously been urged on several grounds *supra*, pp. 41-44. It remains only to point out that the substitution of Inspector Mintzer for Inspector Danielson arose out of the continuance of the board hearing from March 16 to April 6 for the sole purpose of enabling petitioner to appeal to the medical appeal board (R. 14). We believe that petitioner is not in a position to complain of a substitution resulting from a continuance of the board hearing for the purpose of enabling her to pursue her only effective remedy on the medical issue.

In any event, petitioner was plainly not prejudiced by the substitution of inspectors. As we pointed out in the Statement, *supra*, pp. 6-7, when the board reconvened on April 6, the minutes of the previous meeting were incorporated into the record, and Inspector Mintzer indicated that he had familiarized himself with the brief and scarcely significant proceedings which had occurred at the first meeting. "The change in the personnel of the Board [of Special Inquiry] furnishes no proof that there was not a fair hearing. The minutes of the first hearing were made part of the record at the second, so everything was before the board that took final action. It is well settled that a maintenance of continuity of personnel is not necessary so long as all the essentials of a fair hearing are observed by the board exercising ultimate judgment." *United States ex rel. Minuto* v. *Reimer*, 83 F. 2d 166, 167-168 (C. A. 2), and cases cited.

Finally, as noted above (footnote 19, *supra*, p. 46), the substitution of inspectors could not have prejudiced petitioner for the additional reason that the finding of the medical officers on the medical issue was conclusive upon the board of special inquiry.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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APRIL 1949.

APPENDIX

1. The Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, *et seq.*, as amended, provides in pertinent part:

* * * * *

Sec. 3 [8 U. S. C. 136]. The following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; * * * persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living; * * *.

* * * * *

Sec. 11 [8 U. S. C. 147]. For the purpose of determining whether aliens arriving at ports of the United States belong to any of the classes excluded by this Act, * * * the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, may direct that such aliens shall be detained * * * a sufficient time to enable the immigration officers and medical officers stationed at such ports to subject aliens to an observation and examination sufficient to determine whether or not they belong to the said excluded classes * * *. * * * the Commissioner

of Immigration and Naturalization may, with the approval of the Attorney General, issue such regulations, not inconsistent with law, as may be deemed necessary to effect the purposes of this section * * *.

* * * * * *

Sec. 16 [8 U. S. C. 152]. The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien; * * *. All aliens arriving at ports of the United States shall be examined by not less than two such medical officers at the discretion of the Attorney General, and under such administrative regulations as he may prescribe and under medical regulations prepared by the Surgeon General of the United States Public Health Service. Medical officers of the United States Public Health Service who have had especial training in the diagnosis of insanity and mental defects shall be detailed for duty or employed at all ports of entry designated by the Attorney General, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens in whom insanity or mental defect is suspected, and the services of interpreters shall be provided for such examination. Any alien certified for insanity or mental defect

may appeal to the board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and said alien may introduce before such board one expert medical witness at his own cost and expense. * * *

Sec. 17 [8 U. S. C. 153]. Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. * * * The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and, except as provided in section twenty-one hereof [infra, p. 52], shall be final as to the rejection of aliens affected with * * * any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section three of this Act.

* * * * *

Sec. 21 [8 U. S. C. 158]. Any alien liable to be excluded because likely to become a public charge or because of physical disability other than tuberculosis in any form or a loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Attorney General upon the giving of a suitable and proper bond or undertaking, approved by said Attorney General, in such amount and containing such conditions as he may prescribe, to the United States and to all States, Territories, counties, towns, municipalities, and districts thereof, holding the United States and all States, Territories, counties, towns, municipalities, and districts thereof harmless against such alien becoming a public charge. In lieu of such bond, such alien may deposit in cash with the Attorney General such amount as the Attorney General may require, * * *.

* * * * * *

2. Title 8, Code of Federal Regulations (1947 Supp.), provides in pertinent part:

* * * * *

PART 60—FIELD SERVICE DISTRICTS AND OFFICERS

* * * * *

§ 60.29 *Persons qualified as members of boards of special inquiry; oath.* In accordance with the provisions of section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153), the following persons are hereby designated as qualified and determined to be eligible to serve on boards of special inquiry:

(a) Immigration inspectors, including persons designated immigrant inspectors by § 60.27;

(b) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards for the purpose of keeping the complete permanent record of the proceedings and of all such testimony as may be produced; and

(c) Persons, other than employees of the Immigration and Naturalization Service but preferably Government employees, who are selected by an Immigration and Naturalization Service official in charge of a port where no permanent board of special inquiry is maintained and to which it is impracticable to detail a board from some other station. Such persons shall, before serving on a board of special inquiry, subscribe to an oath of office on Form I-266 before an immigrant inspector.

* * * * *

PART 130—BOARDS OF SPECIAL INQUIRY

§ 130.1 *Organization.* Each of the three members of a board of special inquiry prescribed by section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153) shall be a person qualified for such membership as provided by §60.29 of this chapter. The officer in charge shall designate one of the members as chairman. One of the members may act as secretary for the purpose of keeping the com-

plete permanent record of the proceedings before the board and of all such testimony as may be produced before it.

* * * * *

§ 130.4 *Medical examiner as witness.* Where the certificate of the medical examiner fails to describe particularly the nature, character, and extent of the physical defect which it is certified may affect the ability of the alien to earn a living, boards of special inquiry shall call such examiner as a witness and interrogate him fully as to the particular nature, character, and extent of the affliction certified. Such testimony shall be made a part of the record.

* * * * *

§ 130.8. *Alien certified for mental condition; right of medical appeal.* An alien certified for insanity or mental defect shall be advised of his right to appeal to a board of medical officers of the United States Public Health Service, and that he may introduce before such board one expert medical witness at his own cost and expense. The exact language employed in so informing the alien of his rights, together with a full and accurate transcript of his reply, shall be inserted in the record and made a part thereof. * * *

* * * * *

PART 136—APPEALS FROM DECISIONS BY BOARD OF SPECIAL INQUIRY

* * * * *

§ 136.1 *Who may appeal.* * * * When an alien is certified for a physical defect other than tuberculosis in any form or a loathsome contagious or dangerous contagious disease, the board of special inquiry must decide on the basis of all the evidence (including the medical certificate) whether or not such certified defect may affect his ability to earn a living. An alien rejected on said ground is entitled to appeal.

§ 136.2 *When no appeal lies.* No appeal lies where the decision of a board of special inquiry, based upon the certificate of the examining medical officer, as required by section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153), rejects an alien because (*a*) he is afflicted with tuberculosis in any form or a loathsome contagious or dangerous contagious disease, or (b) he is an idiot or an imbecile or an epileptic or is insane or feebleminded, or (*c*) he is afflicted with constitutional psychopathic inferiority or has any mental defect or is a chronic alcoholic.

* * * * *

3. Title 42, Code of Federal Regulations (1947 Supp.), provides in pertinent part:

* * * * *

PART 34—MEDICAL EXAMINATION OF ALIENS

§ 34.1 *Applicability.* The provisions of this part shall apply to (a) the medical examination and re-examination of aliens presented

therefor to the Public Health Service upon the arrival of such aliens at a port of entry * * *

* * * * *

§ 34.2 *Definitions.* As used in this part, terms shall have the following meanings:

* * * * *

(c) *Medical certificate.* A document issued by an examining medical officer to the Immigration Service, signed by him and certifying his findings with respect to an alien's physical and mental condition.

* * * * *

§ 34.6 *Aliens afflicted with disease or defect.* If an alien is found to have one or more physical or mental diseases or defects, medical officers shall report their findings to the Immigration Service, by medical certificate * * *

§ 34.7 *Certificates and notifications; Class A.* A Class A certificate * * * shall be issued with respect to any alien who is found to be afflicted with any of the following diseases or defects:

(a) Tuberculosis in any form;

(b) A loathsome or dangerous contagious disease;

(c) Idiocy, imbecility, feeblemindedness, epilepsy, insanity, chronic alcoholism, or constitutional psychopathic inferiority;

(d) A mental defect not enumerated in paragraph (c) of this section; *Provided, how-*

ever, That a Class A certificate * * * shall in no case be issued with respect to an alien having only mental shortcomings due to ignorance, or suffering only from a mental condition attributable to remediable physical causes, or from a psychosis of a temporary nature caused by a toxin, drug, or disease.

§ 34.8 *Certificates and notifications; Class B.* A Class B certificate * * * shall be issued with respect to an alien who has a physical defect which is of such a nature that it may affect his ability to earn a living. The certificate * * * shall state the nature and extent of the physical defect, whether it is chronic or permanent, and the extent to which it is likely to render the alien incapable of pursuing a vocation or profession for which he has particular training or experience, or, if he has no such vocation or profession, incapable of performing ordinary physical or manual work.

§ 34.9 *Certificates and notifications; Class C.* A Class C certificate * * * shall be issued with respect to an alien who has a disease or defect other than those for which a Class A or Class B certificate * * * is required to be issued.

* * * * *

§ 34.13 *Re-examination; convening of boards; expert witnesses; reports.* (a) The Surgeon General, or when authorized, a medical officer in charge, shall convene a board of medical officers to re-examine an alien

(1) Upon the request of the Immigration Service for a re-examination by such a board, or

(2) Upon an appeal by the alien from a certificate of insanity or mental defect, issued at a port of entry.

(b) Such a board shall consist of three, when practicable, but in no case less than two, medical officers. In the event that a board consists of three medical officers, the decision of the majority thereof shall prevail.

(c) Re-examination shall include:

(1) A medical examination by the board;

(2) A review of all records submitted;

(3) Use of any laboratory or diagnostic methods or tests deemed advisable; and

(4) Consideration of statements regarding the alien's physical or mental condition made by a reputable physician after his examination of the alien.

* * * * *

(e) * * * an alien who has appealed from a certificate of insanity or mental defect shall be permitted to introduce at least one expert medical witness. * * *

* * * * *

(g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.

(h) The board shall report its findings and conclusions to the Immigration Service, and shall also give prompt notice thereof to the alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers.

* * * * *

4. The Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237, *et seq.*, provides in pertinent part:

* * * * *

Sec. 2 [5 U. S. C. 1001]. As used in this Act—

* * * * *

(e) License and licensing.

"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

* * * * *

Sec. 5 [5 U. S. C. 1004]. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved * * * (3) proceedings in which

decisions rest solely on inspections, tests, or elections; * * *

* * * * *

(c) Separation of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigating or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses * * *.

* * * * *

Sec. 7 [5 U. S. C. 1006]. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency,

(2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. * * *

* * * * *

Sec. 11 [5 U. S. C. 1010]. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, * * *.

* * * * *

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